

MINUTES
REGULAR MEETING OF THE BOARD OF LAND COMMISSIONERS
Monday, September 20, 2004, at 9:00 a.m.
State Capitol Building, Room 303

PRESENT: Lt. Governor Karl Ohs, Superintendent of Public Instruction Linda McCulloch, Secretary of State Bob Brown, and State Auditor John Morrison

VIA TELEPHONE: Attorney General Mike McGrath

Motion was made by Mr. Brown to approve the amended minutes of the Board of Land Commissioners' meeting held August 16, 2004. Seconded by Mr. Morrison and Ms. McCulloch simultaneously. Motion carried unanimously.

BUSINESS TO BE CONSIDERED

Mr. McGrath requested that agenda item 904-7, 2004 Sustained Yield Calculation, be the first item to be addressed. He made a motion to move it to the top of the agenda, make it an information item today, and postpone action until the October 2004 meeting. He said we've had concerns that the public hasn't had an opportunity to comment. His understanding is if the Board postpones consideration of it for 30 days, that it won't create a problem with pending timber sales.

Mr. Ohs responded saying there are a lot of people in the audience that made the trip to Helena, he suggested to go ahead and take testimony today, and after that the Board could take whatever action it wanted it to.

Mr. McGrath said he stands by his motion. We can go ahead and have testimony, obtaining information, but that the Board take action on it at its October meeting.

Mr. Brown asked could you divide the motion? You have two parts to your motion. One is to move item 904-7 to the top of the agenda, the second is to have it not be an action item today. This has been on the agenda as an action item and there is a fair number of people here today because of that, and it's the Chair's ruling that this continue to be an action item and the Board can take whatever action it wants to when it addresses it. But I think the Chair wants to continue to have it be an action item. I don't care if we move it to the top of the agenda. Could you divide your motion?

Mr. McGrath said we could do that. If you would move it, I actually don't care where it is placed on the agenda, the problem is I may have to disconnect before the end of the meeting. He said he wanted to make the motion not to take action until October, and it doesn't seem like it will create any problems to do that. It gives interested parties an opportunity to comment. It is a two-part motion but the big issue is I don't care when it is taken up on the agenda but I want not take action today.

Mr. Morrison said he wanted to make a substitute motion that the Board move 904-7, 2004 Sustained Yield Calculation, to the first item on today's agenda. Seconded by Mr. Brown. Motion carried four to one. Lt. Governor Ohs opposing.

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904-7

2004 SUSTAINED YIELD CALCULATION

Mr. Clinch said before we launch into this, a little bit of history might be pertinent. This item comes before the Board as a result of HB 537 of the 2003 Legislative session, that not only this Board supported, but Secretary of State Bob Brown and Superintendent Linda McCulloch were vocal advocates. During that process, the issues associated with developing new sustained yields was discussed and debated at length. It is important for this Board to know that the same issues associated with forest land management are delineated in the State Forest Land Management Plan (SFLMP) and in forest management rules this Board adopted in the spring of 2001, not in anything within this sustained yield document. The sustained yield merely looks at those rules that we have developed and adopted relative to forest land management. It takes the most current inventory data and produces a number to tell us where we should be harvesting based on those management scenarios that we've adopted through an extensive public involvement process.

Tom Schultz, DNRC, said HB 537 was passed by the legislature, that is the primary reason we're doing this study. If it hadn't passed, we have requirements in statute to recalculate the Sustained Yield Study every ten years, at a minimum. One reason we do the Study is to provide assurance to the public and the Board that we're meeting our trust obligations and managing the ground in a sustainable fashion. It ensures that the harvest levels are consistent with the philosophy and the plan that was adopted by the previous Board and with the rules adopted by the current Board. It makes sure we are not over cutting or under cutting based on the principles and the constraints that we've set through the existing rules. It helps ensure that we're moving the forest, over time, in a fashion that represents a desired future condition. Basically, science is here to tell us what is. In terms of what should be isn't necessarily a scientific question, it is a political question, a decision we make through the political process. So we can always have debate in terms of what is appropriate, what should the forest be in the future. But what we try to do in this modeling process is to say we looked at the past and to the best of our knowledge if we had done things differently, if we didn't have much fire suppression for example, how might the forest look today? How can we move the forest in a positive direction? The model demonstrates to us that we are moving the forest into a desired future condition that is characterized more by shade intolerant species, and it shows a decrease of the shade tolerant species. If someone were to ask me are we managing the forest consistent with the SFLMP, I can point to the model or the model can demonstrate that yes, over time, we are moving in a condition that replicates what we want to see on the landscape. Another thing the model does is enable us to make assurances for the resource to the public and to the Land Board that we're managing in a way that is thoughtful and takes into account old growth, threatened and endangered species, sensitive species, and a variety of things. We can constrain the model in such a fashion that it provides habitat for these animals across the landscape.

There have been some changes between this study and the previous study. Two of the most important changes to recognize are: (1) we have additional acres in the inventory. We have had a lot of discussion about the status of our inventory and we've worked hard to update and improve the inventory. Not only have we collected more inventory but we've also got a better inventory, more current, in some instances. Overall we have 100,000 acres of inventory data that wasn't run in the previous sustained yield model, not only total acres, but operable acres, acres that the model thinks should predominantly be managed for timber management. (2) This model is a different model than we ran in 1996. The first model was more spatially oriented and the model we're using now is a linear programming model. The linear programming model basically can optimize one variable. Then you constrain that optimization with different things like old growth, wildlife, and watershed concerns. Again, this model is going to maximize or optimize one variable and then constrain it with a variety of different things. In this case we

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initially tried to look at maximizing or optimizing both net present value as well as timber harvest levels and ultimately fell back to the net present value. Two reasons for that, there wasn't a lot of difference between the maximization of the timber harvest output and the net present value, and also we think as trust managers it is probably more prudent to run it based on a net present value more so than just timber output.

A couple of things to be aware of we've talked to the Board on several occasions about the Habitat Conservation Plan (HCP) that we're currently negotiating with the US Fish and Wildlife Service. He said his expectation is that the process will be completed in late summer of 2007. This model is a component of that HCP negotiation and that calculation. This sustained yield level, whatever the Board ends up adopting, will be the baseline or the "no action alternative" for the HCP. I have received some questions about the consistency in models. We've changed from the 1996 model; the HCP will be predicated upon the same model we're running now so we can have a direct comparison in terms of the benefits and cost of what we might negotiate in an HCP. The HCP should be completed by summer 2007, and I will say it will definitely be completed by the end of that calendar year. The life of this current yield is only going to be about three years. When we run it again, there will be multiple alternatives to develop in accordance with the HCP. I expect at least three alternatives, if not more. There will be a range of new sustainable yields to choose from as a component of that process, but the number we're talking about today will have a life of three years. Finally, I just want to talk about our consultant Mason, Bruce & Girard is a forestry consulting firm out of Portland, Oregon, in business since 1921. We've worked extensively with them. They were selected as part of this process through the HCP. Mark Rasmussen has a background in forest modeling and forestry and economics, he joined the company in 1996, with a predominant focus in forest planning and policy and economics. They have conducted these types of timber management plans we're talking about today, sustainable yield studies, for nearly thirty federal, state, tribal, and private forest properties, totaling 22 million acres.

Mark Rasmussen, Mason, Bruce & Girard, gave a quick overview of the results of the calculation. He said our objective was to make the calculation reflect the decisions made in the 1996 SFLMP as well as the rules adopted in 2003. We also incorporated better inventory data and new spatial data as well as the new administrative rules. He presented a power point show and explained the slides to the Board and audience. The Sustainable Yield Calculation has to provide for not just timber, but also other resources are receptive in the calculation, and there is a notion about being able to produce timber over long periods of time. Which conforms to the standard notion of what sustainable yield is. A few statistics helps put this in perspective. Overall there are 1.2 million acres managed by DNRC, 726,000 of those are forested acres, and about 668,000 of those acres are commercial forest land which means they are productive enough to be considered capable of growing commercial crops of timber. The inventory is about 3.8 MMbf on those acres. The current annual growth on the forest now is about 83 MMbf, and if the stands were all properly stocked and growing at optimum levels, that could be up to about 95 MMbf/year. That potential annual growth number is also referred to as maximum biological potential. Since 1996, there is about 248,000 acres that are in the inventory data base that weren't there last time. Many of those are on the east side and in the central area. There are about 173,000 more manageable acres in this calculation than were in the last calculation. Since 1996, the inventory on about 346,000 acres has been updated, so we have better information. The productivity in terms of yield projections in this effort are very similar to the last effort. In some cases, a little bit more productive. We're using about the same level of growth in these projections, but this time around I believe we have a broader array of management regimes. For each parcel of land we're considering more management options, a whole range of things we might do to each acre. As Tom mentioned, we have a different modeling system, this model is an optimizing model versus a simulation model. We built a timber harvest scheduling model into this optimizing model

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system. Once we had the model built, we had numerous runs trying to understand the differences in harvest, present net value, revenues, and acres as we added one set of constraints at a time. The idea is we start off with a very unconstrained model and then we add one set of constraints, and then another set of constraints, and then another set. We are looking at the incremental changes between those runs to help us understand the cost of each of those constraints. It helps us understand that we were constraining the model properly.

Mr. Brown asked for an example of a constraint.

Mr. Rasmussen said between one run and another, we withdrew 49,000 acres of grizzly bear habitat from production, and in another one we added in the riparian constraints. At the very end we added another set of constraints designed to help take the solution and make it more easily implemented by the DNRC. We included constraints that got to the desired future condition that came out of the 1996 SFLMP and many of those constraints put limits on how much even age management will be practiced in the forest. We looked at the 2003 rules for very specific constraints about how to manage the timber in eagle nest areas, grizzly bear areas, and fisher habitat, what to do about the snags in riparian areas and in the sensitive watersheds etc. This is where the sustainable yield calculation comes in, the ability to manage lands and sustain the forest.

Mr. Clinch said he wanted to talk about the inventory data that we began with, the baseline data. You not only have the tree composition, the size, species, but information about grizzly bear habitat, riparian areas. You enter all of this into the database and then when you start asking the model to make deductions for critical grizzly bear habitat, it goes into that database based on all the inventory data the department has gathered to make those determinations.

Mr. Rasmussen said we have two or three things that are fundamental. First is the inventory database and the GIS representation of that. In the GIS we know where all the stands are and how they sit relative to each other. This 49,000 acres for grizzly bear area was drawn over those stands and when we took out 49,000 acres, it's the 49,000 acres in those stands, not just any 49,000 acres. From the plot data we then assign a beginning volume and a beginning stand table, a description of the trees on each of those timber stands. So when we take out those 49,000 acres, it's not just those acres but it's the trees on those acres. So our model can then make projection about how those trees will grow with or without management. We have several benchmarks in the model for various constraints and scenarios. Mr. Rasmussen showed slides depicting the benchmarks and the results. He said when you break it down at a lower level, some runs indicated that we have more inventory than we need to sustain harvest levels. The runs that have increasing inventory we relied more heavily upon.

To calculate present net value, we looked at the anticipated revenues and costs under each harvest schedule over a 175-year period and discounted it back by a 4% discount rate. Modeling the policy or the regulation for old growth constraints was difficult because the old growth definition is based upon having a certain number of trees of a certain diameter and of a certain age. The problem with age is, it is not often collected in an inventory, it is very expensive to collect. We have a little bit of age data and we extrapolated that with the other data. What that means is we don't feel like the age data we have for the existing inventory is very reliable. So we took a two-tiered approach to old growth constraints. We said during the first 100 years, we'd have about 11% of the forest that is identified in the inventory database as being in the stands that are considered to be old growth under this definition. We'll take about 42,600 of those acres and will protect them from harvest for the first 100 years. After 100 years, we feel like the ages we have in the inventory are ages created by the model and we are more comfortable with those ages

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and then we'd say after 100 years we want about 55,000 acres that meet this definition of old growth. The harvest schedule protected about 42,000 acres of old growth in the moist and dry types and about 50% in the cool type. When we looked to find out how many acres meet these definitions, what we saw under these runs was that we have lots and lots of acres, many more than the 55,000 acres we were looking for to meet those definitions. This is a mathematical model, there are lots of things we can model and some things that we can't model. We were able to model the rules that specified where you can do it, how you can do it, what you can do, when you can do it, and how much of it you can do. There are a number of other restrictions that aren't incorporated into this kind of model. For example, maybe you have some rules about when you can go into a stand relative to elk calving or something like that, those kinds of things we can't do. We haven't modeled here any disturbance events like fires, insects, disease, etc., our model projection takes into account the background level of mortality you might see in a stand but not any kind of epidemic mortality. With this kind of planning, if you have a big fire and you lose a lot of acres, you make a new calculation. We can draw a couple of conclusions from the model about what kind of strategies you might employ in order to meet your objectives. The first is you need to be focusing on stocking. Acres that are slated for even aged management with the model, you will want to treat the low stocked acres first and get those acres into a productive state so they contribute to the future growth as rapidly as possible. On the uneven aged acres however, the model was interested in treating the overstocked acres first. Again, it is a matter of trying to get the stocking in the right place. In almost every run, we saw that the model preferred the even aged management because it would produce higher returns and the model was trying to put even aged management on more productive acres. If there was ever a constraint limiting how many acres can be managed in the even aged system, they wanted to fill that constraint with more productive acres, and put the uneven aged management on less productive acres.

I was asked to provide recommendations for what you do next time. Its always good to have better inventory data. You never get enough details. We made extensive use of the stand level inventory, Brian Long and his staff spent a lot of time keeping that up-to-date and that worked really well for us. The other thing to do would be to find some way to monitor growth so we have a way in the next round to calibrate the growth models with a little more precision. One way to do that would be to establish a set of permanent plots and re-measure them every ten years. In summary, the sustainable yield level from run 8 would be 53.2 MMbf which incorporates the philosophy found in the SFLMP and the administrative rules. All of our runs show that there is more inventory out there than you need to sustain the harvest levels that we've calculated. If you wanted to accelerate harvest in the short term, you could do that without dropping below the long term.

Mr. Clinch said the one tract you've got there with the harvest levels is the most compelling one. On the total acres that we manage, the top line represents that in the totally unconstrained world where we had no statutory requirements and other societal goals the inventory data you analyzed shows that biologically state forest lands could produce 110 MMbf for the first 35 years, and after that it would produce 80 MMbf is that the right representation of that?

Mr. Rasmussen said this is 110 MMbf per year for the first five years. And then you could go down to 80 MMbf.

Mr. Clinch said and we know that we can't operate that way because there are a wide variety of constraints that prohibit us from doing that and rightfully so. Each of the other models that we've run add on another layer of constraints, either legal constraints, statutory constraints, or constraints that are represented in our SFLMP or our rules. That is what is depicted with the drop from 80, to 75, to 60. Then we get down to the lower three lines there and those are predicting levels of harvest under all the

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constraints including the rules and the SFLMP as well as other non-legal requirements like the distribution of our harvest around our area offices so we can implement that the way we are currently staffed as well as the distribution to restrict the model from even aged managements that purely does reflect what we think. It is reflected in the SFLMP and what our society demands of us. That brings us down to two different runs. The non-declining even flow of 53.2 MMbf or the other number that you didn't talk much about, the 58 MMbf, that says you can do that out to year 100, is that correct? And then it drops down into somewhere in the mid-40's. The reason you can do that is the same reason of the upper levels, the abundance of large, old trees on the landscape as a result of the history of state forest land management. There is an abundance of large diameter and heavily stocked stands on state land. Is that correct?

Mr. Rasmussen said yes. I don't know if they are large, but it certainly is over stocked stands.

Mr. Clinch said so really all of those runs and models, while they are nice to talk about, the real decision is based upon statutory requirements, State Forest Land Management plan, rules, and other self-imposed constraints, and is really between 53.2 and the 58 MMbf. Is that correct?

Mr. Rasmussen said yes.

Mr. Schultz said when I was testifying before the legislature on this issue, there was lots of debate and discussion about biological yield versus sustainable yield. A lot of people talked about using science to come up with the number. I just want to caution you, if you read how the state statute, and the Society of American Foresters defines sustainable yield and not take into account the mitigations we are applying on a routine basis whether it be for operability constraints or for wildlife mitigations whatever that might be, really doesn't constitute a sustainable yield. A biological yield is different. Keep in mind that 95 million is a different number than the 53 million we're bringing to you. One thing we didn't get into much is why did we have the model run, run 9, shows $\pm 10\%$. We have had discussions at this Board as to why did we sell volume at low market and why didn't we sell more at high market, and my response has been that its very difficult. When I invest in mutual funds on a monthly basis, I put the same amount in every month regardless of what the market is doing, it's a dollar cost averaging approach. That is typically how we viewed the timber program. What this tries to account for is that a $\pm 10\%$ we thought that wasn't going too far in one direction and by trying to acknowledge that and maybe if we give the model a little flexibility and gave us a little flexibility, how will that play out. And we recognized if we give it $\pm 10\%$ you see an increase in yield in the first 90 years and you see a decrease, but over the long term it is going to average out the same. The big difference isn't so much the volume, the difference in the 47 MMbf and the 58 MMbf, its really the net present value. We didn't focus on that. But if you go back to that slide, you'll see a big difference, roughly \$100 million, between run 8 and run 9. Regarding public involvement, we have met with the public along the way in this process. I testified before the legislature that we would run one year without the model being run because it would take a while to get it calibrated, get the contractor hired, and get it to run. My expectations were that we'd have this model and the number in place this fiscal year, which began July 1st. I pushed my staff hard to get this done and get it to the Board in June. Well, obviously, we didn't get it to the Board in June. Most of that delay was due to our internal work load and trying to meet with the contractor and get this modeled and put together, as well as meeting with the public. We are here today finally. And I did notify the public along the way as to what I was expecting. We met with the public in late 2003 - early 2004, and I will not say we had the perfect public involvement process, we did what we could along the way as we had information available to us. I suspect the public will say we met early on and it took us a long time to get back to them. That is a very accurate statement. The predominant reason for that is we didn't have the information to share

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along the way. We met early to notify the public what we were doing, we picked up more toward the end as we had more certainty in terms of getting ready to run the model, what can we model, what can we do to address concerns? I was at a meeting on June 4th and it was a productive meeting and at that meeting the public did influence the process. They raised concerns about mitigations and how we were dealing with things. It caused us to think about things in a different fashion. We had good discussions, substantive discussions, and I felt good walking away that we'd moved in a favorable direction. From my perspective, the best time to get involved isn't after the fact, it's during the process. I feel like we did try to actively go out and engage the public we knew were interested participants in the process. I kept the public involved and abreast of the issue. I told them in June I expected to go to the Land Board in September. It is the Board's call as to whether that is sufficient, from my perspective I told the public what to expect, and we followed through with what I told them. On the old growth, Mark used the term "preserve" or "protect" old growth, and there may be folks in the audience that agree with that terminology but I caution against that, I would use the term we "manage" old growth. There aren't absolute constraints in the model that says we are never going to manage old growth. Even the old growth that shows in year 100 (there are 55,000 acres out there) that may not be the same 55,000 acres that is available in the year 175. We will manage the stands we have out there in a such a way, particularly the old growth, that it retains a lot of the characteristics post harvest. And in most cases, it still meets the definition of old growth post harvest. Because of the management we're applying on the ground in effect we can demonstrate that we are perpetuating and growing old growth over time. There will be biodiversity on the landscape over time, we're moving in a desired future condition that is appropriate.

Mr. Clinch said the questions probably looming is why are we here with this today and what is the rush. Quite frankly, I have sensed from this Board and others an urgency to bring this forward. Most of you remember that not only during the legislature but at the first Board meeting when we discussed this, there was a great deal of concern about operating in the interim at the 50 MMbf without a scientific-based sustained yield report to backup our management options. We made a commitment to the Board that we would only do that for one year and would be back at the start of the next fiscal year. Obviously, we didn't make that. And there continues to be that issue raised both in the media and by other people. Regardless of what happens today, I think it is important that this report is before the Board and that it is aware that we now have a highly credible scientific study that, in fact, justifies the growth in yield and the recommended harvest on state land. The other reasons that motivate me is because of the increased harvest. I put in an EPP request for two new FTE that we will strategically locate within our department. We are well along in that process, and we need to have those things in the process and starting to be budgeted. The second other reason is the financial impacts associated with this. The increase in volume from the 42 MMbf of the previous sustained yield to this 53 MMbf, an increase of 11 MMbf, is an increase in revenue for schools of about \$3.5 million. Regardless how that gets disbursed, it is significant dollars and its important to get that out as we contemplate and struggle with school funding issues, it could be an important piece of future resolution for all those issues.

Ms. McCulloch asked is there a significant difference in our timber harvest program in the state if we wait the 30 days for public input?

Mr. Schultz replied there will not be a significant difference in the timber program. We will prepare implementing a number somewhere between 50 and 53 and we're going to continue to bring sales to the Board.

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Mr. Morrison said this Board has been a strong supporter of moving forward with the sustainable yield study. Prior to our endorsement of HB 537 in the Spring of 2003, I made direct comments about wanting to move forward with this even though it was ahead of the normal cycle to get a scientific conclusion as soon as possible. I don't have any reason to doubt the accuracy of this report at all, and it appears to me to be a great study. My compliments to you for doing that. I do have some questions about this issue of whether to allow 30 days of additional comment for other interested parties. First, to follow up on Linda's question, are there any sales at all that would be delayed if we waited 30 days, and take formal action next month?

Mr. Schultz replied no sales would be delayed.

Mr. Morrison said ok and asked, secondly, when was this report first available in its final form? My understanding was something like September 2nd, is that right?

Mr. Schultz replied even in its final form we're not going to say it is a final report until such time as the Board has acted. So there is no final report until you take action. We've had the first draft released on August 26th and we had another draft released on September 1st or 2nd. Its been available between when it was released until today, a little bit less than three weeks.

Mr. Morrison asked have there been any kind of meetings to take comments from other interested parties since August 26th?

Mr. Schultz said there have not been any additional meetings.

Mr. Morrison said so the only interaction with, for example, the conservation community as well as the timber and wood products industry, has been on the dates indicated on the slide?

Mr. Schultz said that's correct in terms of face-to-face sit downs. I have had a couple of phone calls.

Mr. Morrison said during these meetings of public involvement outlined on the slide, did you discuss any issues such as the use of the optimizing versus the simulation model, the yield constraints, and those kinds of methodological issues. Did those come up in these meetings?

Mr. Schultz replied we did. To be honest, a lot of those technical issues, even for myself, are difficult to understand. I'm not going to say we didn't address those issues, but we spent much less time on those issues than listening to concerns about old growth, wildlife, and those kinds of things, or issues on the other side about what is the biological yield of the forest. We did have early discussions, probably back in the November meetings, talking about yield tables and the model but most folks, I think, have been more concerned about the mitigations or the constraints more so than what kind of model we are using.

Mr. Morrison said since the report came out on August 26th, have you had people from either side, either one of these interested party communities come to you and say we want a chance to comment further before the Land Board acts?

Mr. Schultz said yes. We've had several comments requesting additional time. We received a FAX from Montana Environmental Information Center (MEIC) that was signed off by several people requesting additional time. And yes, I did get an e-mail regarding that also.

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Mr. Morrison asked anybody else beside MEIC?

Mr. Schultz said I think MEIC signed for a couple different folks. It was a letter they put together that acknowledged Friends of the Wild Swan, Alliance for the Wild Rockies, and the Montana Old Growth Project. The letter was inclusive of more than just those folks.

Mr. Morrison asked was it a request for additional time or did it raise specific issues that they wanted to address?

Mr. Schultz replied the gist of the letter was that they may have other issues, but currently it was more of a focus on time. They wanted more time, more so than anything technical or substantive issues.

Mr. Morrison said did you get the idea from their request that there were certain specific things they wanted to comment on in the next 30 days, or are we just buying time here?

Mr. Schultz said I don't know that I am in an appropriate position to say that folks have good substantive issues. I can testify that we got comments from the Friends of the Wild Swan, Arlene Montgomery, that I think were substantive questions, and Jane Adams also submitted some substantive questions. There were some substantive questions raised by Alliance of the Wild Rockies which were similar to those by the Friends of the Wild Swan. There were substantive issues raised and I think we could answer those questions today, we have staff here to do that. The rest of the comments were just for more time to look things over.

Mr. Morrison asked are representatives from those organizations here today?

Mr. Brown said maybe we could follow up on what Tom Schultz just suggested here. I think I understand where Auditor Morrison may be going. If we can address the specific questions today, maybe we can proceed with this. Is there a spokesperson from MEIC, Friends of the Wild Swan, can you come up and present your questions and concerns?

Anne Hedges, MEIC, said I've got to say I am incredulous at the way the public participation aspect of this has been presented to you today. We have a lot of substantive comments. We have a lot of concerns. We think there are problems with this model. We have been talking about it since we met with them on November 11, 2003. Mr. Schultz wasn't at that meeting, it was just one individual from DNRC. We requested that meeting, we've been requesting meetings since last year to try to get at some of these issues. To try to get, in writing, responses from DNRC about how this is proceeding. We have been told we will be responded to. We weren't responded to, we were sent information that wasn't useful, that didn't provide any answers to the questions we had asked. We had to ask for every single meeting. We didn't get what we wanted, we still don't quite understand some of the issues that are in this model. We are not necessarily technical experts, we have to go out and hire and get volunteers to be technical experts for us and you can't do that in six working days. And that was what we were given to respond with comments to this huge document. This is very important, there is a lot of technical information in here that we have not seen prior to the beginning of September. And you expect public interest groups to go out and get experts to help us do a good credible job of analyzing this model. A new model, very different from 1996, and the constraints and try to figure out if this is appropriate or not. And you expect us to do that in six days. That's not fair. The meetings they had with us, the first two meeting I attended, but I can tell you every meeting they couldn't answer our questions. That's why we kept asking for more meetings. I am very frustrated that this discussion doesn't automatically consider the fact that the public

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has the right to participate. I know people who are not here today because they didn't have enough time to actually look at this model. They are not going to be represented if you take action on this item today. You should delay this item by 30 days, give us a little time to go out and get experts and get credible, informative responses and questions for DNRC and provide those answers in writing. Doing this today is a hurry-up job, and there is no reason for it. Why wouldn't you provide the public the time it needs to look at a document that is going to guide timber sales for the next decade? This is going to drive every timber sale long after this Board is gone. Why won't this Board require the DNRC to respond to those comments in writing as you do in basic rulemaking, as you do in most comment periods, as you do in most MEPA processes? I don't understand the hurry and I think it inappropriate.

Arlene Montgomery, Friends of the Wild Swan (FOWS), said I attended all three meetings and I won't reiterate what Ms. Hedges said, but its true, we did not have an opportunity to even get anything that told us where DNRC was going with this model until June 4th, and then it wasn't until the Land Board was given a copy of the Sustained Yield Study that I called Tom Schultz because I read it in the newspaper and asked when I could get a copy. He sent me a copy of the draft the Board got, which was about August 30th, and then the new ones went out September 1st. Its just not enough time to look at this document and for DNRC to respond to our questions. Mr. Brown, I could go through the questions I have, I did e-mail them to all of you on the Land Board so you could see what my concerns are, we could be here for hours answering these questions and I don't think it is a reasonable use of our time right now. As Ms. Hedges said I would like to get the answers to these in writing because I need to look this stuff over, take it out and get the opinions of people who have more expertise on this so we can understand it or if we have future questions, provide DNRC with informed comments. I think to wait 30 days is not unreasonable to ask. Only 14 people were sent a copy of the document and there was no public announcement of its availability.

Mr. Ohs said we have the SFLMP and the administrative rules and it is pretty well set out in those how we well operate in the forest. So, when you take into consideration there are the rules and the management plan, are there variables in this study?

Mr. Schultz said we have to make interpretations. The rules in and of themselves in some cases are difficult to model. Like was mentioned by Mr. Rasmussen, you have to make an assumption as to what you're going to model. So I am not going to say there aren't some calls we've made along the way to interpret the rules. Some of it is more black and white than others. We talked about grizzly bear corridor habitat. That's a pretty black and white issue to deal with in the rules. We can say here is the area on state land that meets the definition of grizzly bear corridor, and its been removed from the model. Other things, old growth for instance, was one that was more difficult to deal with. We did talk to folks in advance of what we were doing. Not to say that there was 100% agreement with what we did, but I felt like walking away from that meeting on the 4th that we had a common understanding of how we were going to model old growth. There were recommendations and other things we tried to deal with. We did have to make some assumptions, like in anything we do, its not all black and white. Some of the things are more gray. We did have public comment on the SFLMP and the rules, but we still have to take policy and concepts and put them into workable solutions through a model. So we do have to take liberty with things and make those assumptions.

Mr. Ohs said how many people here other than those who have testified, would like to speak on this issue? We have three. We'll go ahead and take that comment at this time.

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Mr. Morrison said I am also curious to find out what exactly the people who would like 30 days for additional comment would propose to present to us within that 30 days. Is 30 days enough to have somebody review this study and issue a response? Are we talking about a longer hearing, 30 days next month at the Land Board meeting, at which we receive points and counter points at that time and make a final vote? I'd like to hear more about how they envision that unfolding. Any one interested in the additional 30 days comment is welcome to address that.

Roger Bergmeier, MonTRUST, said I had the opportunity to study the document fairly well, I did not have the time to make any written responses to it. But overall, I thought it was a very good study. I think maybe because of my own forestry background I was able to read it and understand it better than some folks, I don't know. Maybe the lack of comments is due to the fact that it is a straightforward study and easy to understand and see where the state and consultants were coming from. I especially like it because it points out what the Threatened and Endangered Species Act, old growth, and other constraints does to the income that is produced from these lands over a period of time. A pretty significant impact. In fact, the Threatened and Endangered Species, I sometimes feel that this is an unfunded mandate from the federal government that prevents the trust from earning the income that is required and it ought to get. Maybe the Board might want to request reimbursement from the federal government for those lands that are taken out of production for the purposes of earning income for the trust. I have been working in Northwest Montana for a couple of months, and in that area this study did not address fire, insects, and disease because it is impossible to do that, but the reality is there are several things going on. We've got the Douglas fir bark beetle, the engraver beetle in the grand fir, we've got the Western pine beetle and mountain pine beetle, Douglas fir Tussock moth is coming on in the Polson area. We have a lot of areas where Mother Nature is providing a lot of the snags that people would like to have around for cavity-nesting birds. It seems to me like things are happening out there that need to be addressed now in almost in an emergency situation. I would like to see the department get into that area a little bit more in the future because it does have a significant impact on those lands.

Ellen Engstedt, Montana Wood Products Association, said we represent 16 Montana-member companies all involved in the value-added production of wood products. These brief comments are on behalf of all of the companies that rely on the help of the Montana timber industry for their livelihood but there will be a couple of comments from some individual companies as well. We worked diligently during the 2003 legislative session to ensure passage of HB 537 to increase harvest on state trust lands because we knew then, as we know now, it is possible to cut more trees at a sustainable rate than the 42 MMbf figure. We were confident the figure would be over 50 MMbf and the study bears out that confidence. Along the process issue, I certainly don't feel blindsided by a draft report that I received on September 2nd, we invited members of the agency come to our resource committee, which is our technical committee, three different times and we also heard a report on it June 22nd at the DNRC timber purchaser's meeting. So we weren't surprised by the figures or the data or the process. I certainly felt we were involved. In the summary you'll find the number used for the maximum sustainable harvest is just over 94 MMbf. After dealing with the implementation constraints, and Mr. Bergmeier is right, you look at deferred acres, grizzly bear core, and buffers, and a number of riparian issues the number drops dramatically, it drops to 53.2 MMbf per year. I want to remind the Commissioners how important each additional million board-feet is to both the State of Montana and the communities in which the mills are located. The following numbers are ones we used to lobby the bill during the legislative session and were provided by Charles Keegan, University of Montana, Bureau of Business and Economic Research, and Mike Niccolucci of the US forest Service, the numbers are direct, indirect, and induced direct impacts. For each additional million board-feet harvested, and a million board-feet is 250 truck loads, employment is increased by 23 workers and \$765,000 in labor income. There would be federal tax receipts of about \$135,000 and state

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tax receipts of about \$60,000. The multiplier effect of the timber industry is 5-7 times for each direct dollar. Outside the discussion of the actual sustained yield study but still one more important point to make are the increased funds increased harvest provides to the timber technology account. This account was established a few years ago to help schools purchase computers and other technology equipment. The legislature attempted to raid this account in the last session to balance the budget but we actually teamed up with the education lobby and we fought off the efforts of the Budget Office and succeeded in keeping the more than \$2 million in the account that was then sent directly to schools. This year that amount will be over \$3 million. These dollars are over and above any legislative appropriation so are direct increase in spending in the classroom for Montana kids and it is directly related to the amount of harvest off of state lands. We in the timber industry believe in sound science and sustainable forestry. The completed study provides both. We urge your adoption. I did receive the report on September 2nd and managed to submit comments before the deadline of September 15th.

Ron Buentemeier, Vice-President of F.H. Stoltze Land & Lumber Company, said today you are considering the results of the Sustained Yield Study that was mandated by HB 537, passed by the 2003 Montana Legislature. First I would like to thank you for your support when this legislation was being considered. The study had benefits for all of Montana. Secondly, the following comments are being made from my training and experience of 41+ years as a professional forester, land manager, and vice-president of our company. We are the third largest private forest landowner in Montana. The Sustained Yield Study in 1996 showed a biological sustained yield of 58.6 MMbf on 616,000 acres. The sustained harvest level chosen was 42.2 MMbf on 363,000 acres. Management was occurring on 59% of the forested acres. The 2004 study shows a biological sustained yield of 94.6 MMbf on 668,000 acres with a present net value of \$346 million. With the chosen sustained harvest, and I think it is very important that you distinguish between sustained yield and sustained harvest – they are two different terms and have two different meanings, of 53.2 MMbf on 430,000 acres that has a present net value of \$146 million. This is 64% of the forested acres and 42% of the present net value or the biological sustained yield. As Land Board members you are charged with management of school trust lands for the benefit of the trust. A question you should be asking is, is managing for a revenue return on 64% of the acres available and 42% of the asset value returning the proper amount to the trust? Is this good asset management? As an owner of this land I would say no. On page 13 of the report there are productivity classes shown, in my experience in Western Montana, the values being used are very consistent. On some of the best sites we've experienced two and a half to three and a half times the productivity shown. These are two figures in computing the biological sustained yield. Is using these figures benefiting the trust? On page 30 there is management advice given and there are two statements which concern me. First, it is stated that even aged management is more productive and more profitable. Given current environmental constraints I do not believe this is a correct statement. Intensive management that controls stocking levels on a regular basis and on even aged stands will be more productive and return more revenue. The second statement that more inventory is available than needed to meet sustained probable harvest levels is worrisome. Is the harvest level being set to protect ecosystems, wildlife, etc., is this wise management of the trust assets? Are you following the trust mandate? Under the proposed sustained yield harvest level, I am concerned about the inventory shown on the even aged managed areas because mortality increases with age and there is no recovery of this mortality. It is highly unlikely that the inventory on the 237,000 acres will continue to increase. How does the trust benefit from this loss in revenue? During development of the sustained harvest the SDS growth model was used showing growth and mortality. This model has the capability to show growth and mortality in separate figures and I would encourage these be included in the final report. These will be important figures in the future to judge the performance of land management activities. Also on page 30, Management Advice, and again on page 39, Summary of Findings, there is mention of stocking level controls as ways to improve growth. It is disappointing that

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the study did not recommend other ways to improve growth and recover mortality so the overall return to the trust can be improved. One example of ways to improve growth is by investing in fertilization on certain lands. I have attached to my letter two examples of improved yields on company land. Example #1 is Douglas fir that was fertilized in 1997, seven years later we have increased that 3 inches in diameter and 3.7 times increase in volume. On a Western larch we have a 4½ inch increase in diameter, and a 4.6 times increase in volume. On an eight-year three-site study on our land we have shown a 6.9% return in investment. Not all sites will respond to this treatment, however state lands have many similar sites. State trust lands must be aggressively managed to provide the intended return to the various trust account. This study begins to point out the potential for revenue generation, it should only be used as a potential benchmark, not as a maximum. I challenge this Board in being proactive in insuring a maximum return to the trust lands.

Jane Adams, Montana Old Growth Project, said I have big concerns about the Sustained Yield Study, largely because I have a lot of questions about it, there are a lot of things not answered in the study. One is that there is a huge difference between this study and the 1996 sustained yield study in the maximum biological potential. This study is saying you can get almost 1½ times yield per acre than the 1996 study. That is an enormous difference and there is no real explanation as to why. Some of this is because of all the acres they have discovered, 286,000 acres discovered on the East side, but a lot of those acres are not very productive and its only 67,000 that actually are included in the study. But a lot of it is due to differences in the model. I have worked on modeling projects and found that it is a pretty common understanding that a model is just a mathematical tool. There is nothing set in stone about the results that come out of it, when you have two models that come out with such vastly different results, you need to look at the assumptions. How is this model choosing the stands to harvest, why are there such huge differences before just accepting the results of this model. There could be some big problems in the model, and one that sticks out to me is the yield projection that says the yield projections reflect improved growth and stocking control and proper tuning of seedlings. It also says pre-commercial thinning is a major activity required to achieve the yield calculated by the model. I am wondering is that above what the foresters are doing now? And if it is, how are the foresters going to do all this improved and increased pre-commercial thinning and taking better care of the seedlings and stocking control if they also have to harvest 26% more timber every single year? That is a big question about the logistics of doing all this work. The contractor said the current annual growth is 83 MMbf but the potential annual growth is 95 MMbf, so I want to ask are they suggesting that the foresters are not doing their job right now? That they could and should be doing a much better job and that the forests are capable of producing all this much more? I think before we ask the forest and the foresters to produce that much more and insist that they do, we should first see if it is possible. Another concern is that the model admits that it totally ignores spatial considerations. The foresters can't ignore spatial considerations. When they are putting together a timber sale they have to look at the proximity of different stands. They have to put together stands into a timber sale package that the loggers can bid on. There may be other reasons where a stand isn't completely inaccessible but for social reasons, biological reasons, or for some other reason it is not a good idea to harvest it as intensely as the model predicts you should. I am concerned that it takes away some of the flexibility that the foresters need to do a good job in putting together timber sales that are going to work for the timber industry to bid on. The model also totally ignores potential losses to fire and insects. That is unrealistic. We all know there are many thousands of acres that are going to burn before they can be harvested. We also know that insects can have devastating impacts. We can't have a model that ignores that. The model also ignores other management standards and guidelines like seasonal use restrictions, road construction standards, snag guidelines, sale design parameters, etc. that is unrealistic. The document says to the extent possible, the model assigns the more productive acres to even aged management regimes. I can sympathize with why the timber industry might want to do that

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but the SFLMP and the new rules have biodiversity standards, and the most productive sites happen to be the most valuable for wildlife, old growth, for a whole range for maintaining biodiversity. To assign them or all the ones possible to intensive timber management is not going to maintain a standard of the Omega alternative selected. Mr. Buentemeier just said that he didn't think even aged management was the most productive way to do it. We need to look at is the assumption in the model a good assumption, is it a good way to operate? I did send in comments and I have a lot of other comments to make. I think there are some major issues that need explanation in this document and my response about what to do with this 30-day comment period is give the consultants time to address some questions and then after they have addressed these questions, I'd like to write my final comments after they have addresses the questions and then I am hoping we can make a decision on it.

Julia Altemus, Montana Logging Association, said the MLA represents 600 small businesses that work every day harvesting or transporting timber to the mills. So this issue is very important to them, and I just want to say we support the previous proponent's comments to this and we also believe the report is probably erred on the side of conservancy, but we do support what the department is proposing.

Arlene Montgomery, FOWS, said I am responding to Mr. Morrison's question about a 30-day comment period. I think that Ms. Adams gave an overview of some of the concerns we have, and some of them are pretty technical and do warrant a response from DNRC. I believe that a 30-day public comment period where the draft is issued to the public would give us an opportunity to be able to look more closely at the draft and would give DNRC time to respond to the concerns we've already presented to them as well as any others. Then after that 30-days at that point the Board could take it up as a measure again. I think it might be cutting it close to schedule it for the next Board meeting.

Mr. Morrison said I am persuaded that the 30-day period for public comment is reasonable. I think it is critical with a long term plan like this that we have sufficient opportunity for comment, that the public feels the process is inclusive, and it sounds like there is concerns on both sides that may be addressed in a specific way over the course of the next 30 days, so if Attorney General McGrath wants to renew his motion, I'll support it.

Mr. Ohs said there are some budget concerns here, there are things that we have to get done. I am concerned that after hearing some of the testimony that 30 days may not be enough to get us down the road. I have concern about that. I think it is an attempt to try to get the number down lower, something I am not comfortable with and so I am inclined to go ahead.

Mr. McGrath moved the Board put this over for action to the next meeting. Seconded by Mr. Morrison.

Mr. Brown said as a substitute motion he moved the Board adopt the sustained yield recommendation, 53.2 MMbf, as determined by the scientifically-based study contained in action item 904-7 on today's agenda. I do that because this has been advertised as an action item and we've had some good input today but I think we ought to vote this up or down today. We've heard a fair amount of testimony, but with the possible testimony of Ms. Adams, no specific information about what's to be accomplished by delaying this for 30 days. To me, the research presented is powerful and compelling that we can harvest certainly a minimum of 53.2 MMbf on state land on a sustainable basis. On the basis of what the study contains and on the basis of what folks have testified here have said, it seems to me there is no question about that. There have been approximately 9-10 months of public involvement in this process, there has been a lot of input already taken into consideration, and a reasonable person here today could've heard what we heard today and would agree that there is more than ample justification for proceeding with this

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recommendation. In closing, those who are proposing delay today are essentially the same people who opposed the enactment of HB 537 during the 2003 legislative session. We had debate and discussion then about the advisability of proceeding to harvest 50 MMbf of timber instead of the 42 MMbf of timber based on our assumptions about what this study would show. As you know, HB 537 went ahead and established the study that has resulted in more than conforming the wisdom of passing HB 537. The bill passed with only 7 votes against it in the House of Representatives, and only 3 votes against it in the Senate. Now we have the same folks coming back here today who are still unhappy with that outcome. I think what we are proposing here will generate significantly more income for the timber technology account to buy computers for kids in our public schools, it will generate jobs, there is no question but what the 53.2 MMbf timber can be sustained into perpetuity and I think we can go ahead and pass this motion.

Mr. Ohs seconded the motion.

Mr. Morrison said I raise the question on point of order whether it is a timely motion, whether it is appropriate to make a motion to approve the study at this time when there is a pending motion to take up the issue as an action item at the next meeting. I don't think that's an appropriate substitute motion.

Mr. Brown said a substitute motion is always in order. You can't make two substitute motions, but you can always make one.

Mr. Morrison said the motion was made by Attorney General McGrath. I seconded it. Both of us supported the endorsement by this Land Board of HB 537 so the statement that the people making this motion oppose HB 537 is simply incorrect. Furthermore, this motion and the consideration given to the public asked by the people in this room, the consideration suggested by the editorial board of the Daily Interlake in Kalispell, the consideration of those people is not the equivalent of saying that there is anything wrong with the study presented by Mason, Bruce, and Girard today, it seems to me it is a high quality study and it has addressed the critical issues. But at the same time, we have been assured that taking 30 days to allow public comment to ensure the integrity of this process will not delay a single timber sale. So the attempt to frame this as some kind of debate over the accuracy of this study is simply false. I think that the process and the public deserve our consideration for 30 days.

Mr. Brown said I wasn't characterizing the members the Land Board as being in opposition of this legislation that appeared before the 2003 legislative session, but the persons who spoke here today as public representatives were also in opposition to the bill, at least in a couple of cases when the bill came before the legislature in the 2003 session. Secondly, a substitute motion is always in order. So my motion is in order. Thirdly, one of the persons who spoke in opposition indicated that if we delay this for 30 days, then she wanted further input at that meeting, and perhaps another 30 days or she didn't say how long, before ultimately she wanted the Land Board to come to some kind of a conclusion. I think we've heard enough and are in the position to make a decision if we want to do so.

Ms. McCulloch said there are two issues that are most important to me. One is what has been called the "brick in the toilet tank issue" to make sure folks always understand that the things we do on the Land Board does not mean that there will be more money into schools in Montana. The legislature sets that level, the Land Board is really the first brick of that money. The second thing I've always been most interested in not only as a Land Board member, but as an agency director, is public access. Not only do I believe in public access to our state lands in Montana, but I believe in public access to our process of government. In my agency, we have made sure that public access is something that you go out and

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solicit, we want to make sure that not only on the rulemaking process but also on decisions we have handed down to us from the federal government in the No Child Left Behind Act and so on, that we have plenty of input from our constituency. That is something that I've maintained as a Land Board member that we need to make sure we have access to information to both sides of any issue. Today's issue is one that we've looked at, I'll be honest with you, its not an election season, I believe looking at it and making sure we have at least 30 days would be an issue that this Land Board would support. One of the things that I think made HB 537 so supported by members in the legislature is that we had plenty of time, Secretary of State Brown and I, had plenty of time to work on those numbers for the legislature and folks also that were the constituency that came out. That's why there was a broad bipartisan vote in both the House and the Senate. I think 30 days makes no difference, frankly I would be arguing this for any side on any issue, I think the study is a valid and reliable study, it is something we can support, but the last thing I want is this study done and then be marred and overshadowed by a lawsuit because we've not allowed a public process. To me, making sure we have a public process, as evidenced here today, its been a good study, the people of Montana enjoy having public input, by having seven days with only a small targeted audience receiving the information, that's not how we do business in Montana. I support having a 30-day delay to make sure folks get to have their input.

Mr. Ohs said we do have a substitute motion on the table. As Parliamentarian and Chairman its been my experience that a substitute motion is always in order. I guess I'll probably rule on that and take a vote on it.

Mr. Morrison said if the Chair is inclined to vote on the motion made by Secretary Brown, I want our friends in the audience here and in the press to be very clear about the fact that a vote against this motion is not a vote against this study. It is a vote to return to the previous motion and to allow the additional 30 days for public comment.

The vote was taken on the substitute motion. Two votes in favor, three votes against. Motion fails.

Mr. McGrath reiterated his motion to put action on this item over to the next meeting to allow opportunity for public comment. The only other thing I would say other than to echo what Ms. McCulloch said about process is it is very important that we not preclude the public process.

Motion seconded by Mr. Morrison. Three votes in favor, two against. Motion carried.

Mr. Clinch said so I understand clearly, this item will be back before the Board as an action item next month and public comment will be accepted for 30 days. So 30 days from today, where ever that puts us and I want to make sure it doesn't put us after the next Land Board meeting, the department shall receive public comment. Depending upon when that public comment comes in, we may have a chance to review it and respond to it. If it is the day before the Board meeting, it may be back here with unresolved issues because of the short time. I just want to make sure we don't want to clarify that at this time.

Mr. Ohs said let's make that clear. The motion was to postpone it until the next meeting for public comment. I don't think that necessarily has to be 30 days. Was that the intent of the motion?

Mr. Clinch said my concern is we will accept public comment either through written comment to the department or next month someone can come to the podium and present their lengthy public comment at that time? I want to make sure I understand exactly what we are to do.

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Mr. Morrison said if Attorney General McGrath wants to address that he can, but I would say just by way of offering guidance to folks who are interested in offering comment is that you shouldn't wait until next month's meeting. If you have comments you want to present you should present them early enough that they can be digested by our staff and the department. I understood from some of the comment that in fact the intention is to present it to the department sufficiently in advance so you can then present whatever response you have by way of rebuttal.

Mr. Clinch said we'll do the best we can to analyze whatever comments we get in a timely fashion and respond back even prior to the next Board meeting if we're given an opportunity by the respondents.

Ms. McCulloch said I don't want to put words into Attorney General McGrath's mouth, but when we talked about the 30 days, the process has always started when the information went out public that would be the beginning. We talked about needing at least 30 days, we always have 30 days for public input and that has already started at the beginning of this month so I would think that would secure our timeline but the motion was to make sure this was done by the next Land Board meeting. I think that would take care of it.

Mr. Clinch said so what you're saying is the 30-day public comment period is running right now, having started on September 1st and then ..

Ms. McCulloch said I believe the motion didn't include the 30 days, we want to make sure we allow at least 30 days because that's how we always do input. All of this should culminate before the next Land Board meeting.

Mr. Clinch said the reason I ask is because I've just been told the next Land Board meeting is October 18th and depending upon how we count those days, it may only be 28 days from today.

Mr. Ohs said you made the motion, can you hear this conversation?

Mr. McGrath said my intent was that we'd take action at the next meeting. Mr. McGrath disconnected from the conference call at this time.

904-1 ADMINISTRATIVE RULES – LAND BANKING

Mr. Clinch said during the last legislative session, HB 223 was passed which provided for a land banking program. As a result of that, the department has been involved in negotiated rulemaking for the past year actually crafting and discussing with interested parties and stakeholders the rules to be drafted to implement that. You may remember one year ago in September 2003, the Board gave approval to the department to go ahead and begin negotiated rulemaking. We've accomplished that and are back now after having completed a public involvement process not only through negotiated rulemaking, but through a series of public hearings, and we're back for adoption of the final rules.

Jeanne Holmgren, DNRC, said we did go into substantial detail with the Board's staff at our pre-Board meeting last week, but given the audience we have here today, parcels that can be nominated for disposition can be nominated by the lessee, the Land Board, and the department. I really want to talk about the implementation and how we're going to launch this program.

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- What is land banking? In the 2003 legislature we were given the land banking program. In that, we can dispose of state trust lands, we can deposit those funds into a land banking account and we can use those revenues to meet our goals and objectives of increasing public access to our lands, generating a greater rate of return, and diversifying our land holdings.
- How did we get to where we are today? As Mr. Clinch indicated, through this Board and this process we established a negotiated rulemaking process, appointed a committee in which over an eight to nine month period we established draft rules by which we went to a public rulemaking process. We held two public hearings, one in Miles City and one in Missoula, we had no attendance at those meetings and very few comments. I believe that is because we largely addressed the issues and concerns over the negotiated rulemaking process.
- How do we intend to launch the program? Again, the lands can be nominated by the lessee, the department, or the Board. We will be sending a notification letter to every lessee providing them with information as to how, if they are interested in nominating the property they lease, they can nominate the land, and the fees associated with going through the land banking program. We also have a handbook for the staff and for the public which provides a more detailed road map for the disposition and acquisition process. Because statutorily 75% of the 100,000 acres that can be sold under this legislation have to be isolated properties. We intend and figure of that the largest percentage of the properties that come before this Board will be nominated by the lessee. There will be some non-isolated properties that will have a higher acre value so we can go out purchase those properties that generate a greater rate of return and have public access as well.

At this time I would like to thank and acknowledge the members of the negotiated rulemaking committee because they worked very hard and dedicated a lot of time and effort. Some of those folks are here today. On that committee I would like to mention Anne Hedges, Janet Ellis, Rosie Keller, Leslie Taylor, Nancy Schlepp, Harold Blattie, Dore Schwinden, Bob Vogel, Ray Marxer, Dan Berube, Bill Orsello, Tony Schoonen, and Jack Atcheson. And personal recognition to Candace Durran, she has done a great job of putting this program together.

Mr. Morrison said I wanted to add my thanks to the committee as well. It was a long process putting together the 2003 land banking legislation, and there was a lot of gnashing of teeth along the way and when we hold public hearings and no one shows up, I guess that means that you've apparently done a good job in terms of accommodating the public interests. It is a remarkable thing to do to get the wildlife federation and the stockgrowers on the same page for the legislation and apparently people from all groups have been supportive of these rules, and that is really a credit to the work you've done and we're looking forward to moving forward with this project.

Anne Hedges, MEIC, said following through on the process theme, I want to commend the department. They took a very difficult project, they put together a good group of people, they got it done, they did a great process. And process matters, that's how we got to the conclusion that we reached, there was no one up here today opposing these rules. It should be instructive to this Board and the department on the grazing rules that are up next. It is instructive to say to everybody when you include the public from the beginning and you go through a long, grueling process like we did, and you come out at the end and everyone is content, process does matter. It is a benefit to the public. I think these rules are going to be very important as we move towards the Programmatic EIS on real estate management. I want to commend the department and say thank you for doing it right, thank you for taking the time and the

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energy and devoting the resources you had to and listening to everybody's concern and working to try to problem solve the issues that came up.

Jack Atcheson, representing Public Land Access Association, Skyline Sportsmen, Coalition for Management of State Land, and himself, said I was part of this process and I guess nobody can object to getting more access providing that's what we get. And that's what I believe will happen. The Land Board on October 22, 2002, agreed to what the procedure and what they would offer to the public and that's what the public will hold them to. There are a couple of things I wanted to point out here that is required, now after 100 years it is decided to start selling some land and the first obligation the Board has is to follow the law. That's the very first thing. Money is secondary. The Montana Supreme Court and the Constitution and in a lawsuit from Ravalli County indicates the requirements as to how the land will be managed and wildlife and the public will be considered. The land is public land. The Enabling Act says so, and the Constitution says so. And I assume that is what it will be. The law says paying full market value and that's what the Constitution and the Enabling Act says, it doesn't say anything about providing any good deals and I assume there won't be any and this will be a pretty open process. The words "trust" and "grant" indicate that there are strings attached to the federal government. State land is part of Montana, and Montana is subject to the laws of the US Congress. The Land Board is responsible. He provided a list of items for the Board to review. I attended all the meetings and we agreed on pretty much all of the things presented to us. There are other subjects that these people I represent do have, but I won't go into it now, I want to see how this process unfolds. As you say nobody showed up at the meetings so I guess the public is going by what was reported and hopefully this is what we're going to get.

Motion was made by Mr. Morrison to approve the final adoption of the land banking rules. Seconded simultaneously by Ms. McCulloch and Mr. Brown. Motion carried unanimously.

904-2 ADMINISTRATIVE RULES – AG/GRAZING PREFERENCE RIGHTS

Mr. Clinch said in July District Court Judge Sherlock in Helena ruled on a case pending before him relative to a state grazing lease in Montana and ultimately that ruling struck down the preference right provision in §77-6-205, MCA, because he deemed it was unconstitutional because it denied the Board their discretion for choosing the best lessee possible. Since that time, there has been quite a bit of debate on the landscape and with members of the Board and staff in terms of what is the appropriate way to proceed. Whether we should appeal the decision, do a statutory change, or rulemaking. One of the first things that comes before us is the knowledge that the department annually renews between 800 – 1100 leases on an annual basis shortly after the first of the year. Neither an appeal nor legislative changes could occur in such a fashion that we would have a process in play to address next year's ground leases. So consequently, the department, in consultation with others, believes that a rulemaking process which would ultimately be adopted by this Board would be the appropriate, at least interim, way to put in play a policy and process that will allow the department to go through the next renewal process and be in compliance with Judge Sherlock's order. That's not to say that either of the other recourses, an appeal or legislative changes, might be pursued as well. Having laid out that a rulemaking process is the way to proceed, time is of the essence because we need to get through that process by the first of the year so we can have those rules adopted and noticed so they will have the full effect of law by the first of the year. It is imperative we get started on that process. It is important to talk about how the department thinks an administrative process of rulemaking can put into administrative rules a process that is acceptable to the

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Board within the bounds of our fiduciary responsibilities and is implementable from the department's perspective, consistent with our strategies for land management.

Kevin Chappell, DNRC, said when we first began discussion about how we might implement the ruling that came forth in July, we talked about what criteria we could try to establish for the Board so it could exercise the discretion that was spelled out in the ruling from District Court. We quickly came to the decision that you really create some difficulties to try to establish that criteria. There just wasn't an easy way to try to come up with various things you can measure that we could forth with a recommendation for the Board on who you would select as the best lessee. So we looked at the statutes and seized upon an existing statute that spells out how our lessees are supposed to manage the properties under their ag and grazing lease. That's how we evolved into a process where we are suggesting today that lessees that have managed their property in a fashion consistent with what was spelled out as statute be afforded a preference right to renew their lease and match their bids. That is important because as we go out and do inspections on the leases that are coming up for renewal that's something that is measurable, something that we can quantify, and something that we can see on the ground as to how those operators are taking care of that property. As opposed to trying to evaluate other criteria that people say they are willing to do in order to acquire a state lease. We think that would be an important first step. If our lessees have managed to lease this properly, that they be given the right to make application to renew their lease and a right of preference to match any bids that are submitted. We have drafted the rules to that effect. We will evaluate leases, we will make that determination. If they failed to meet that criteria then they are not even going to be offered the right to renew their lease. We will notify them and advertise the property for open competitive bids at that time. So it is important to spell that out up front before we get into any kind of bidding process that may evolve in those kind of leases. From there if a lessee is afforded the right to renew his lease, make application to do so, he can match bids if they are submitted, and also go through the hearing process that's in place under statute if they believe the bid that is submitted is excessive. The one thing we are proposing to do at that time, however, would be if the lessee matches the bid and goes through the hearing process, that the director, through the hearings we conduct each year, would hear information and testimony from both parties as to whom might be selected, in fact, as lessee. In those situations, the director would come forth with a recommendation to the Board as to what the appropriate rental rate should be and who the lessee should be between the competing parties. That does open it up at that particular time. To accomplish the rulemaking, we will hold hearings around the state and it is our intent to come back to the November Board meeting with a recommendation based on the outcome of the hearings. Our leases all expire on February 28, at the end of their term. Statute requires that if you are going to renew your lease you have to submit an application to do so at least 30 days prior to expiration. We normally send out our renewal applications and competitive bids on our leases in early to mid-December, so that's why I feel it is very important to get this process started.

Mr. Clinch said in addition to Mr. Chappell's explanation, it might be valuable for those who don't have a copy of the proposed rules, I'll read the specific language we are proposing. Under the existing body of rules that outline the renewal process, I'm going to read to you the new language we are proposing that this rule process incorporate.

"Under renewal of lease or license and preference right the Board retains the right to select the best lessee possible to fulfill the operating obligations under any lease. In the exercise of the Board's discretion to select the best lessee possible for agricultural and grazing leases the Board recognizes that retention of stable, long-term lessees who are familiar with the operating history and the characteristics of the lease promotes good stewardship of the land and such security of land tenure encourages the lessee to place and develop improvements which in turn increase the

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productivity of the land and improves the management. Consequently, it is the Board's policy to allow an incumbent lessee in good standing a preference right to meet the high bid and retain the lease."

I think that is fairly straightforward language and it is a recognition of the fact that good lessees on the land who are implementing the stipulations and management guidelines are good for state land management. In order to make sure that we're in compliance with some of the language Judge Sherlock put into his order about the Board having the ultimate authority over the selection of the lessee and cannot be overruled by a legislative mandate, we are proposing some additional language.

"Unless the Board decides on its own volition and sole discretion that a lease should be given to a better qualified applicant, a surface lessee or licensee who has strictly complied with the applicable conditions set forth in §77-6-113(1), MCA, has a preference right to meet the high bid offered for lease or license and may retain the lease or license subject to the provisions of (7)."
[ARM 35.25.117(7)]

That is some fairly key language in there and I think you should be concerned about our reference to §77-6-113, MCA. That is the existing statute Mr. Chappell recognized that already speaks to the standards state land lessees must be held to. It reads:

"In the case of agricultural lands the lessee shall observe the ordinary rules for good management of agricultural lands and shall handle the leases land with the view of maintaining its productivity and minimizing wind and soil erosion and noxious weeds, and planting crops with a view of securing the greatest yields of good quality. And in the case of grazing lands, the lessee shall observe the ordinary rules for good range management, shall manipulate the numbers, class, distribution, season of the range use, and the handling, feeding, breeding and marketing of grazing livestock with a view of securing the production of the maximum livestock and livestock products consistent with the conservation of the land resources and the perpetuation of its productivity. And to these ends the state land lease may not be abused by over grazing."

Those are the provisions that the department is saying each year at the time of lease renewal the department shall make a determination with the existing ag and grazing lessees are in compliance. Those are relatively standard practices that have been long accepted and implemented statewide. As Mr. Chappell said, in the case we have bad lessees who are not complying with those standards, these rules will allow the department to make the determination that that lease and that lessee shall not be awarded their preference rights. So in that instance, on an annual basis we will probably have several of those decisions to make to where we make a determination that an existing lessee is not granted their preference right because of non-compliance with those provisions that are set out in existing statute. Some other new language we are proposing in the rule helps to bring all this together is:

"If during the previous lease term an existing lessee has violated any condition set out in §77-6-113, MCA, the lessee shall not have the right to renew the lease or match any other bid submitted. The department shall notify the lessee if it determines they have failed to comply with the requirements of §77-6-113, MCA. The notice shall include the factual basis for that determination. The lessee may within 15 days of receipt of the notice appeal the decision by requesting an informal hearing before the director or his designee. If the director or his designee concluded that the conditions have not been met by the lessee during the previous term, no preference rights shall be recognized."

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We are setting up a process here that is to be analyzed on an annual basis, every lease, and if there are lessees that are in non-compliance of those basic standards of ag and grazing, they shall lose their preference right. As you understand the procedure, when we go through the renewal process, these rules as I presented will allow the existing lessee to match the high bid. If he matches the high bid and he was in good standing, that's the end of the contest at that time. Also be aware that there is a provision in the rules that allows for the individual to request a reduction of that amount in a hearing process and we have brought numerous requests before this Board, and quite frankly, that is the impetus for the lawsuit that emerged. We've provided some new language that says:

“If a hearing is granted [and basically that means if the lessee, after he has met the high bid and is going to request that that bid be reduced, he needs to request a hearing] the director shall consider testimony and evidence from both the lessee and the high bidder regarding the rental rate. The lessee and the high bidder may also provide a basis for why they should be selected as the best lessee by the Board. The director shall recommend to the Board whether there should be a reduction to the bid rate and who shall be selected as the lessee.”

As you can see, while these rules to some extent emulate the process we had before, there is a distinct difference in the new process. We're going to evaluate every lease at renewal time, anyone in non-compliance with the statutory requirements of good stewardship will no longer be granted a preference right. The second new addition is if a preference right is granted and the lessee elects to have a bid reduction, then the department will make a determination not only on the appropriate bid amount but we will evaluate information on who is the better lessee and then bring that recommendation to the Board for action. Those are the rules as we have drafted them. If the Board grants approval, we will go out and hold hearings and respond to the comments, and bring back a final set of rules after completing the rules process. Hopefully it is clear to the Board and the members of the audience how the department is proposing to proceed and hopefully it is clear why we crafted the language we did in order to be in compliance with the Judge's order.

Mr. Morrison said I indicated my opinion after the Broadbent opinion was released by Judge Sherlock that resolving that problem is quite simple. The only problem with the preference right statute as it existed in the mind of the Judge was that it did not allow for Land Board discretion. It cut the Land Board out of the process, and you can't do that because the Land Board is the head of the public land trust. While I appreciate that these rules go into the stewardship issue, that's really not the important part of these rules. The important part is the line that says the Land Board has discretion. As long as it says that the Board has discretion, I am confident that we are going to resolve this problem and the preference right is going to be preserved. So I think these rules are what we need to do the job and resolve that issue and go forward without substantial change in the manner in which the preference right has been utilized in the past.

Senator Jon Tester, SD 45, expressed his appreciation to Director Clinch for these rules. I think that they are well thought out with one exception. Forgive me, but Judge Sherlock's decision struck down preference. I think you need to be careful that the "i's" are dotted and the "t's" are crossed so that you aren't reinstating preference with the rules, that you are in fact giving Land Board discretion as Mr. Morrison said. That is critically important. Section 77-6-205, MCA, is an unconstitutional statute as it stands right now, please don't base your rules on an unconstitutional statute or the folks that have those state leases will be in a worse situation than they are now. I intend to put forth a piece of legislation and we are going to try to fast track it as quick as we can, I think it will meet the timelines for the state land leases. But what it will do is put forth the best management practices as alluded to in the presentation on

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§77-6-113, MCA, but it also has sustainable yield is a big part of that. As we all know, state lands are a tremendous asset to the State of Montana and if those yields aren't sustainable, it really does a disservice to the school trust and it does a disservice to the people in the State of Montana. Just make sure the rules don't go against the Judge's decision or we're in tougher shape than we started out with.

Cork Mortensen, Montana Farm Bureau Federation, said the Farm Bureau thanks the Land Board for the quick response to resolving the issue of preference rights that is facing the Montana agriculture. We also thank the DNRC for drafting a proposed set of administrative rules that will help retain the preference for existing land holders at the time of lease renewal. The rule recognizes the importance of the role that existing lease holders play in caring for the land and that existing lease holders should have an edge in competitive bidding. Montana Farm Bureau is in favor of seeing this rule adopted as written. This will also help address the dilemma of having a solution completed when addressing the next round of state land lease renewals, which are due in January and February, 2005. We cannot leave one fifth of our leases open ended without being protected by this rule implementation. The Montana Farm Bureau asks for a unanimous vote supporting the preference right rule change.

Steve Pilcher, Montana Stockgrowers Association, said I am appearing before you today to request your prompt and convincing support to advance the rulemaking here. This is no doubt a very serious issue, one of concern to a lot of ranchers around the state. There have been several times this morning where you referenced a full house, I would just like to ask all of those who are involved with agricultural leases and have traveled to Helena today to stand up and be recognized because I think you'll see they are here for the purpose of supporting the department's administrative rulemaking process. Nothing speaks louder than Montanans traveling to Helena to make sure their voices are heard. We appreciate the Board's consideration of this, we appreciate the department's efforts to promptly address this matter in time that we do not disrupt a process that we all recognize and all respect. If there are glitches in the law, I agree with Senator Tester, we need to take a look at that and correct it. We need to make sure there is recognition for the important role that the stability of being able to retain these leases. Most of you agree with the retaining of that ability, it is not a guaranteed right, it is not an absolute right, but it is a value that needs to be recognized. I don't think any of us want to find ourselves in a position where the leases go strictly to the highest bidder. I think the department has proposed a very aggressive rulemaking process that allows for more than adequate public participation in four hearings around the state, as well as the normal public comment period. We ask that you give your support to the initiation of rulemaking.

Senator Ken Hansen, SD 46, said I would reiterate and echo Senator Tester's comments. I, too, am not totally opposed to the rule change but I am very concerned. I want the best for the State of Montana and our kids, our schools, but I am also a farmer-rancher. I do not want to get into a situation where we are worse than we are now, and I don't want to be bogged down in courts. So I am not opposed to the rule change, but I am saying be cautious. I'd rather proceed with the bill, maybe along with some rule changing, but I think in the next session in 2005, we can do that.

Clay Dunlap, Superintendent of Schools, Winnett, said we are located in sparsely populated Petroleum County consisting of 1,056,640 acres, approximately 25% of which is state land. On behalf of the constituents of Petroleum County I would encourage the State Land Board to expeditiously adopt the proposed changes to the administrative rules as drafted by the DNRC. These proposed changes would help retain the preference for existing lease holders to retain a lease at the time of lease renewal. We in Petroleum County encourage this action because we do not want to risk receiving only a partial rental payment into the school trust funds or worse case scenario, no payment at all for the affected year. The citizens in Petroleum County greatly appreciate any and all consideration that this request may receive.

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Roy Andes, MonTRUST, said this is a matter of great importance, and I think it requires as much a hearing as necessary as the previous subject matter did. I have to agree with Senators Tester and Hansen, don't make trouble for yourselves. I think this rule makes serious trouble for the Land Board. I don't think it comes remotely close to complying with the Judge's order. The law of trust has three duties that are implicated in this matter. The first one is to preserve the corpus of the trust. That is the one which is always used to defend the preference right. The second one is to maximize revenue for the trust, and the third is the duty of undivided loyalty. There was a lot of rhetoric in the press about Judge Sherlock going off and writing his own opinion and writing law from the bench, with respect those remarks are widely in variation from the law. These are school trust lands. They are not public lands as Mr. Atcheson characterized earlier, they are trust lands. Those three trust principles that I just mentioned are the ones implicated. In this case, reading Judge Sherlock's opinion, it is consistent with the opinions of numerous other courts on trust law throughout the United States. The case of Cheyenne Arapaho Tribes v. Dept. of Interior deals with Indian trust lands and the automatic renewal of oil and gas leases to oil and gas companies on those Indian lands all of which were thrown out by the Tenth Circuit Court of Appeals. Why? Not because the BIA failed to exercise discretion, it did that but it was because it failed to affirmatively investigate whether or not those leases were in the best interests of the beneficiaries. So the duty upon this Board is an affirmative investigation, not the preservation of a presumption, which is what this rule does. It creates a presumption that if you haven't violated your lease terms that you will therefore be the best lessee possible. And that is the problem, the creation of a presumption. If you're going to enact a rule at all, the only one you can enact that is consistent with your trust duties, consistent with Judge Sherlock's opinion, and consistent with the law of trusts as decreed by numerous courts of the United States is that all bidders, all candidates for trust lands submit a bid. Then you may exercise your discretion to say Rancher B's bid is too high. Why do we think its too high? Well here are all the reasons and let's reduce it and give it to somebody who is a better lessee. Because he is unreasonable, he is a spite bid, whatever the grounds may be, exercise your discretion at that level after all the bids are in. But make the incumbents bid as well as everybody else. Then you'll have no trouble complying with Judge Sherlock's opinion and those of other courts as well. I think it is commendable that the ranching community has taken the time to appear in Helena, I do want to call your attention to the fact though, that only one rancher in six in Montana has a state lease, and those other five ranchers have to compete against state lessees when they sell their cattle, etc. so we are not necessarily doing the industry a favor. And I don't think the Stockgrowers are necessarily doing the industry as a whole a favor by taking the position that they are. This rule has come up awfully quickly, if we need an interim rule, the Montana Administrative Procedures Act allows for interim rules for short term rules until legislation or something else comes along. Why not do it that way if you are going to do it at all? Rather than enacting a permanent rule that is likely to get you into trouble. Finally, we will be urging the legislature to look at this as well, preference rights are not do or die in the livestock industry. In Nebraska obliterated it's preference right in 1951, and as far as I know the ranching industry is still alive and well in Nebraska. In Oklahoma it was severely curtailed in 1982 and the industry is doing pretty well there too. Let's look at the legislation, let's look at the rules of the States of Nebraska and Oklahoma, let's look at what they do. We will be miles ahead in terms of both helping our industry and having a workable, manageable, long term positive impact on the trust.

Representative Rick Ripley, HD 50, said I too to support the adoption of the proposed rules and would encourage you to take action on them today. Time is of the essence as has been discussed for the upcoming lease renewals at the first of the year, and knowing that legislation will address the full issue having read Senator Tester's bill draft it looks like a great bill and I am assured that this will be addressed in the upcoming session and am encouraged by that bill draft. But time being of the essence, I encourage the Board to take action today.

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Patrick McNulty, Judith Basin County Farm Bureau, said in Judith Basin County nearly every farmer and rancher has a state lease. I don't happen to have any, but this is a very important issue to get moving on. We cannot go forward with this lease renewal process without some plan in place about how to deal with that. Admittedly we may not have a perfect plan, but we've got to have something or we leave ourselves open to far more litigation. We must establish some rules here, whether you make it a permanent rule process or an interim process, its up to your discretion as a Board, but we've got to move on this issue.

Jack Atcheson said the gentleman just in front of me said that state trust lands are not public lands, the lands were public lands before Montana became a state, and they were set aside for schools, but they are public lands. Whenever they came into the state the Enabling Act called them public lands, our Montana Constitution calls the lands public lands, if anyone had any evidence there is no public lands, then I would have to see it. I wanted to comment on the bidding process. I personally don't care what you do. However, I want you to think of a couple of things. We have here right now real ranchers, and I assume that's what most of these people are, you have ranchettes, and you have people who buy land as part of a portfolio. And that's why a lot of people are buying land in Montana, they are not even going to work here but its part of their portfolio. Then I want you to consider all the people involved including the school kids and what the purpose of the land was actually, why it is there, and should good deals be given to anybody. As I said, real ranchers are one thing and the beautiful portfolio holders are another. Before you start giving preferences you have to consider the source of the preferences, is it someone who is a portfolio holder, or is it one of these people in the audience.

Bob Anderson, Superintendent of Schools, Ft. Benton, said the School Board in Fort Benton does not have a formal position on this nor does Chouteau County, however, because I am an educator in Chouteau County I have had numerous phone calls on this issue. Mainly with regard to preference. I know that most of my constituents in Chouteau County and within these school district of Fort Benton, supports these rules specifically because they do what the State Auditor said, and that is they give the Board discretion to deal with these issues, in particular the preference issue. I hope you do support them and approve it.

Mr. Morrison said I want to make two points here. One is what we're doing today is initiating a rulemaking process. So if you have additional comments you'll have an opportunity to make those during the rulemaking process. Secondly, in response to Mr. Andes comments, I will say that I think Judge Sherlock's opinion is very clear that the problem is not the preference right per se but the statute as currently worded cuts the Land Board out of the process. I am satisfied that these rules get over that hurdle and will comply with the concern that has been raised by Judge Sherlock. I think we should move forward with them and I think they will make it possible to get these renewals done in February, 2005.

Mr. Morrison moved adoption of 904-2, to initiate the administrative rulemaking. Seconded by Ms. McCulloch and Mr. Brown simultaneously. Motion carried unanimously.

904-3 OIL AND GAS LEASE SALE
(Held September 8, 2004)

Mr. Clinch said on September 8, 2004, the department held its annual fall oil and gas lease sale at the Department of Transportation building. A total of 129 tracts were offered for sale. The rental rate that was committed for the bonus bids that day was \$194,678 and we had one tract with a high bid of \$202.00 per acre. Mr. Clinch recommended the Board approve the September oil and gas lease sale.

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Motion was made simultaneously by Mr. Morrison and Mr. Brown to adopt the lease sale. Seconded by Ms. McCulloch. Motion carried unanimously.

904-4 METALLIFEROUS LEASE APPLICATION
(Application for Garnets by Hart Baitis)

Mr. Clinch said this is a lease application to Hart Baitis, and this application is consistent with metalliferous leases we've brought to the Board before with an annual rental rate of \$1.00 per acre for the first three years, and \$2.50 per acre for the fourth and fifth year, and then escalating to \$3.00 after that. It has the standard 5% gross value of an annual royalty as well as a \$5,000 bond. We've had confirmation by the Bureau of Mines and Geology that potential garnets do exist in this area. We've attached various stipulations to the lease consistent with Board direction that protect the tract as well as require the lessee to submit a plan of operations for department approval prior to any mining or exploration activity. Mr. Clinch requested approval.

Motion was made by Ms. McCulloch to approve the application request. Seconded by Mr. Morrison. Motion carried unanimously.

904-5 REQUESTS FOR COMMUNITIZATION AGREEMENT
(Somont Oil Co., Sec 23 and 22, T36N, R4W, 320 acres)
(Somont Oil Co., Sec 23, T36N, R4W, 160 acres)

Mr. Clinch said this is a request for two communitization agreements by Somont Oil Company for tracts in Toole County. As you are well aware, a communitization agreement brings smaller tracts together to be sufficient for the permitting authority that the Board of Oil and Gas oversees relative to spacing requirements. In this particular instance, the department owns 80 acres in the 320-acre spacing unit and the request is for us to be enjoined into that communitization agreement to be 25% of the production. Consequently, the department would receive 3.125% of the 12.5% royalty that is produced out of that communitized spacing unit. Mr. Clinch recommended approval for both communitization agreement requests.

Motion was made by Mr. Morrison to approve the requests by Somont Oil. Seconded by Ms. McCulloch. Motion carried unanimously.

904-6 PROPOSED LEASE - JUDITH GAP WIND FARM

Mr. Clinch said in 2001 after this Board took office, the nation suffered an energy crisis where it was seeing rolling black outs and brown outs in California and other portions of the nation. For a period of time there was great interest in expanding and looking for new sources of energy. This Board held a variety of meetings, Secretary Brown actually did some tours to look at alternative energy sources, we met with people to talk about biomass production and wind energy. Consequently, as a result of that inquiry, the department went forward with the lowest proposal seriously and solicited a Request for Proposals. What we have today is the culmination of that inquiry and the process we went through where we are bringing to you today an actual proposal for a lease to establish a wind farm on state land.

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Jeanne Holmgren said this is a consideration of a long term lease agreement for the development of wind energy on state school trust lands. The parcel in question is six miles south of Judith Gap on state section 36. It is one section in addition to adjacent privately held property that will be ultimately developed for wind energy in this particular location. In May 2002, we went out with a Request for Proposal process across the State of Montana for interest in the development of wind energy on state school trust lands, and Wind Park Solutions, Bob Quinn of Big Sandy, was the successful proposer on this property. Since 2002, meteorological data has been collected and an environmental analysis was conducted. Working with the US Fish and Wildlife Service and Bob Quinn, Clive Rooney conducted the analysis with the finding of no significant impact. There will be an agreement between the lessee and the US Fish and Wildlife Service to monitor for future aid and impacts. A technical advisory committee will be established and the Montana Audubon will be invited to be a member of that technical advisory committee. Currently that property is being managed for natural resource production grazing. That grazing lessee will not be eliminated from the landscape, in fact, we will continue the grazing management under a land use license if this lease is ultimately issued. Again, the lease area is 640 acres, the term of the lease is intended for 20 years to extend for up to 99 years. On the agenda it indicated 40 years, but it will be extended up to 99 years. The rental, depending upon the number of turbines placed on the property the name plate capacity, the megawatt capacity, of the turbine will determine the amount of revenue that will be generated on an annual basis. The figures you see in the agenda item are conservative, again, depending upon the number of towers that will ultimately be placed on trust lands, it could generate up to \$75,000 on an annual basis. The lessee will pay property tax as a result of the beneficial use tax so the county is made whole in those situations as well. Before you we have a lease agreement, we are excited about this. This is the first wind energy lease on state trust lands in Montana. I would like to thank Clive Rooney he was the department representative that is largely responsible. It has been a pleasure working with Bob Quinn for his cooperation and efforts in bearing with us through this process.

Bob Quinn, Wind Park Solutions, said I am an organic farmer from Big Sandy, and am also part owner of Wind Park Solutions America which was established about three years ago after a year of investigation which was conducted by a few relatives of mine in Germany who are in the wind farm business. As you may or may not know, Germany after the last energy crisis 20 years ago, continued forward with their wind and alternative energy production and research and now lead the world because of that. Once the crisis is over and as often happens in this country, the problem is it is out of sight - out of mind and nothing is done for 20 years. Once the crisis has emerged we are now talking about it. Meanwhile a lot of wind production has come to America in the last few years. We have seen a huge growth in wind production in America. North Dakota has 66 Megawatts in production, South Dakota has 44 Megawatts, and Wyoming has 285, and Montana has zero. We are number fourth or fifth for wind resource potential in this state and we are at zero in our production. So we think it is time and we appreciate the opportunity to speak before the Board and incorporate in our program a section of state school trust land. We are located 2 miles from Section 36, it is about 2.2 miles wide and 3 miles long and the turbine fans will generate about 1.5 to 2.0 Megawatts each. This is going to be a great opportunity for income to the state. The state's share will add up to between \$50,000 and \$75,000 per year, if you multiply that out times the number of turbines we are expecting on state land, over 20 years we could be up to \$1.5 million. As you heard from Ms. Holmgren, we will not be detracting from the grazing, there may be a couple of acres out of the 640 that will be removed from grazing by cement blocks, all the rest will be continued to be farmed in a normal manner. We are looking at an increase in revenue by 50-100 fold. The people we've worked with all along and that is to be good neighbors. We have been trying to deal with companies that will build and run this farm and who are interested in being good neighbors in Montana. We have taken a long time to complete this project and we have tried to do everything people has asked us to do in a way

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that will set the tone and the pace to make sure that the first wind park built in this state is not the last. We would like to express our appreciation to the staff we worked with, the Board can be well assured that you are well represented by the people on the ground who are protecting your interests as well as being easy to work with in getting the information we need and also watching out that no one is cutting corners anywhere.

Roy Andes, speaking on his own behalf, said I am familiar with the form upon which this lease was drafted because I use it as the prototype to draft a lease for one of my clients who is a land developer for wind purposes. So I can say having reviewed that lease I am pleased at how thorough it appeared to be and how well put together and very lessor friendly. I think the department is doing a good job here.

Mr. Brown said this is so overdue, wind is the most rapidly growing source of electrical power generation in the world today. As Mr. Quinn mentioned, there are a number of other states that are way ahead of us in terms of developing that potential, on private land as well as public land. We are the fifth windiest state in the nation, even when the legislature is not in session, and so there is enormous potential in Montana and as Mr. Quinn has pointed out we can continue to get the grazing benefit and the cultivation benefit right up to the foot of the wind generators. On state land we can continue to lease that land for what it is used for now and so we just get more income for this purpose. The opportunities are great and expanding for private landowners as well as for state land. When we looked at the map a few of us here saw the distribution pattern of state land around the state and we thought in so many cases there were power lines near sections of state land so if the wind blows where the power line is and the state section of land is located there you have a combination that generates income for the school trust and generates electrical power for the nation and also helps to accredit a new industry in Montana that can also be applied on private land. This is a good day, I am glad it is beginning, I think there is a wonderful potential to go a long ways in the future here.

Mr. Brown moved to adopt the proposed lease request. Seconded by Ms. McCulloch.

Mr. Morrison asked if the department could comment on the 2.7% or \$2,500 per year and how that compares to other leases elsewhere and what was done in order to reach that rate.

Ms. Holmgren said in establishing the minimum price that went out in our RFP process we worked with other western states and also with the National Renewable Energy Lab to establish what is market, what should be our minimum we receive in return for wind energy development. In fact, the \$2,500 per Megawatt as a minimum and we did go out with 2.5% of the gross revenues and the bid was 2.7%. We looked at other states and looked to the National Renewable Energy Lab for comparables.

Mr. Morrison said and this looks like it is basically in the market. Certainly we want to encourage this kind of development and we're delighted it has happened. I want the record to be clear, what we're earning here is consistent with what you see in the market elsewhere.

Ms. Holmgren said yes it is.

The vote was taken on the motion and it carried unanimously.

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Mr. Clinch proposed the Board address 904-8, West Fork Timber Sale and 904-9, Prickly Pear Timber Sale together. These are two timber sales the department is bringing forth this month. Mr. Clinch requested approval.

904-8 WEST FORK TIMBER SALE

This sale is located about 10 miles southwest of Philipsburg with a harvest from 65 acres consisting of three harvest units. The volume is 3,811 tons or approximately 596 MMbf of sawlogs. The purpose is to minimize value loss of trees killed by Douglas fir bark beetles, remove trees currently infested with beetles, and reduce the risk of further beetle mortality by reducing competition and increasing vigor of the trees in adjacent stands. Access is across private land and the landowner agreed to allow access for this timber sale. However, the landowner will only allow a single specific logging contractor to have access to conduct the harvest. The department intends to sell this timber to the contractor selected by the right-of-way owner pursuant to §77-5-201(3)(b)(i), MCA. Less than one mile of road construction is required. Upon completion, newly constructed portions will be revegetated. The department's archaeologist completed a record search and no historical or cultural sites were identified. Public involvement was through newspaper advertisement and scoping notices were sent to adjacent landowners, lessees, and parties who have expressed an interest. Comments were incorporated the proposal. The sale will generate \$62,347.96 in revenue, and no significant environmental impacts will result. An additional Forest Improvement Fee of \$7.47/ton will be charged.

904-9 PRICKLY PEAR TIMBER SALE

This proposed sale is located approximately 8 miles south of Helena and proposes to harvest from 54 acres consisting of one harvest unit. The volume is 1,800 tons of sawlogs or approximately 224.7 MMbf. The proposed thinning operations will maintain an open stand of relatively large ponderosa pine and return the stand to a more natural condition. It will increase tree vigor, reduce fire hazard, and regenerate seral species. Access is across existing roads, no construction or reconstruction is required. An archaeological record search found no historical or cultural sites. Public involvement was through newspapers and letters were sent to adjacent landowners and interested parties. A field tour also was conducted. No significant environmental impacts will result from this harvest operation. The sale will generate approximately \$31,752.00 in revenue, with a \$1.94/ton Forest Improvement Fee charged.

Motion was made by Ms. McCulloch to approve the West Fork and Prickly Pear Timber sales. Seconded by Mr. Brown. Motion carried unanimously.

Mr. Clinch proposed the Board address 904-10, Deschazer v. Wilkonski and 904-11, Jonald & Deanna Jorgensen together as well. These are similar actions, both are requesting a disclaimer of interest. And in both of these instances it's a quiet title action on behalf of a landowner on a navigable waterway. Mr. Clinch requested approval.

904-10 DESCHAZER V. WILKONSKI DISCLAIMER OF INTEREST

This request for a Disclaimer of Interest is on the Kootenai River in northwest Montana. The department reviewed the factual allegations and has concluded that the State of Montana has no possible claim to the disputed lands. The disputed lands involve riparian lands to which the state has no valid claim. The state

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will retain title to all lands below the low water mark of the Kootenai River, while the public will retain the right of public use between the low and high water marks.

904-11 JONALD & DEANNA JORGENSEN DISCLAIMER OF INTEREST

This request for a Disclaimer of Interest is on the Yellowstone River, approximately 12 miles south of Sidney. The disputed land appears to have formed prior to the date of statehood. The department conducted a technical review of existing maps and aerial photographs and concluded that the State of Montana has no possible claim to the disputed riparian lands. The state will retain title to all lands below the low water mark of the Yellowstone River, while the public will retain the right of public use between the low and high water marks.

Motion was made by Mr. Brown to approve the department's request for disclaimer of interest in both cases. Seconded by Ms. Morrison. Motion carried unanimously.

904-12 RIGHTS-OF-WAY APPLICATIONS

This month the department brings 44 requests for right-of-way application to the Board. Number 12417 is from Sunrise Angus Ranch for a private access road, including buried utilities for a single-family dwelling; #12569, 12336, 12571, 12572, 12599, and 12600 are from Hill County Electric Cooperative for buried electric distribution lines; #12573, 12574, 12575, 12576, 12577, 12578, 12579, 12580, 12581, 12582, 12583, 12584, 12585, 12586, 12587, 12588, 12589, 12590, 12591, 12592, 12693, 12594, and 12595 are from 3 Rivers Communications for electric distribution lines; #12668, 12669, 12670 12671, 12672, 12673, 12674, 12675, 12676, 12677, 12678, and 12679 are from Beaverhead County for historic public roads; #12681 is from Beaverhead County Water and Sewer District for a community wastewater system; and #12801 is from Carol Holloway for a private access road to a single family residence. Mr. Clinch said there are no controversial requests in this package, he requested approval.

Barb Kellner, Wisdom Sewer District, said we have two requests and we need to remove our services out of the floodplain by the Big Hole River and the closest place is on state land. We hope the Board approves the request.

Motion was made by Mr. Morrison to approve the rights-of-way application requests. Seconded by Mr. Brown. Motion carried unanimously.

Motion to adjourn was made simultaneously by Mr. Morrison and Mr. Brown.